Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

MARGARET WALKER,
Petitioner,

v.

MISSOURI DEPARTMENT OF CORRECTIONS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title I of the Americans With Disabilities Act, 42 U.S.C. § 12111 to 12117 (1995 & Supp. 2000), is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

PARTIES TO THE PROCEDURE

Petitioner

Margaret Walker. Petitioner is an individual and has no corporate affiliations.

Respondent

Missouri Department of Corrections.

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Howard A. Wittner and Jack B. Spooner of Wittner, Poger, Spewak, Maylack & Spooner, P.C., on behalf of Margaret Walker, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (*App. A at 1a-4a*) is reported at 213 F.3d 1035. The opinion of the district court (*App. B at 5a-15a*) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2000. Petition for rehearing en banc was denied on July 10, 2000 (*App. C at 16a*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). 28 U.S.C. § 2403(a) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

2. The Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. Section 12101(b)(4) of Title 42:

It is the purpose of this chapter . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

4. Section 12112(a) of Title 42:

General rule - No covered entity shall discriminate against qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other conditions, and privileges of employment.

5. Section 12202 of Title 42:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such violations to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

STATEMENT OF THE CASE

1. Title I of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, renders it unlawful for covered entities to discriminate against the disabled in the terms and conditions of their employment. 42 U.S.C. § 12112(a). A "covered entity" is defined to include any "person engaged in an industry affecting commerce who has 15 or more employees," 42 U.S.C. § 12111(2) and (5)(A), and the term "person" incorporates the definition from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which includes States. 42 U.S.C. § 12111(7); *cf. Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 & n.2 (1976). The ADA specifically mandates that States are not immune from liability. 42 U.S.C. § 12202.

2. Plaintiff Margaret Walker was employed as a bond investigator by Missouri Department Of Corrections (MDOC) from October 1987 until May 1994 when she was forced to stop working due to her disability. See *App., Infra.* Following her filing of a claim with the Equal Opportunity

Commission (EEOC), she filed suit in federal district court alleging MDOC failed to make reasonable accommodations in violation of the ADA. The District Court granted summary judgment on the basis that Margaret Walker failed to establish a *prima facie* case. *App.A at 1a.*

3. The United States Court of Appeals for the Eighth Circuit affirmed the District Courts grant of summary judgment. *App. A at 2a.* In so doing, the court held that MDOC is immune from suit brought by an individual in federal court under the ADA. *App. A at 3a.*

REASON FOR GRANTING THE PETITION

On April 17, 2000, this Court granted review in *University of Ala. at Birmingham Bd. Of Trustees v. Garrett*, 193 F.3d 1214, (11th Cir. 1999), *cert granted*, 120 S. Ct. 1669 (U.S. Apr. 17, 2000) (No. 99-1240). In regard to Title I of the ADA, the issue of the Act's abrogation of Eleventh Amendment immunity presented in this portion is identical to the question presented in No. 99-1240. Moreover, as noted in the United States' Brief for the petition in No. 99-1240, the conflict between the various circuit courts of appeals on this issue "is firmly entrenched and incapable of resolution absent intervening action by this Court." United States' Brief at 11, *University of Ala. at Birmingham Bd. Of Trustees v. Garrett*, 193 F.3d 1214, (11th Cir. 1999) (No. 99-1240). Compare *Jackan v. New York State Dep't of Labor*, 205 F.3d 562 (2nd Cir. 2000), *Coolbaugh v Louisiana,* 136 F.3d 430 (5th Cir. 1998), *cert. denied* 119 S.Ct. 58 (U.S. Oct. 5, 1998) (No. 97-1941), *Clark v California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied,* 118 S. Ct. 2340 (U.S. June 1998) (No. 97-686), *Martin v. Kansas,* 190 F.3d 1120 (10th Cir. 1999), *University of Ala. at Birmingham Bd. Of Trustees v. Garrett*, 193 F.3d

1214, (11th Cir. 1999) *cert. granted* 120 S. Ct. 1669 (U.S. Apr. 17, 2000) (no. 99-1240) (abrogation of Eleventh Amendment immunity under the ADA was a valid exercise of Congress's powers pursuant to Section 5 of the Fourteenth Amendment) *with Brown v. North Carolina Div. Of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University*, 207 F.3d 945, (7th Cir. 2000), *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), *cert. granted in part*, 120 S. Ct. 1003, *cert dismissed*, 120 S. Ct. 1265 (Mar. 1, 2000) (Congress's attempt to abrogate Eleventh Amendment immunity under ADA was improper exercise of enforcement power in Fourteenth Amendment). Accordingly, this petition should be held pending the Court's decision in No. 99-1240, or in the alternative, the petition should be granted.

CONCLUSION

This Petition for a writ of certiorari should be held pending this Court's decision in *University of Ala. at Birmingham Bd. Of Trustees v. Garrett*, No. 99-1240, and disposed of in accordance with the decision in that case. In the alternative, this Court should grant certiorari and reverse the decision below.

Respectfully submitted.

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed May 25, 2000]

No. 99-2321

Margaret A. Walker, *Appellant,*	)
v.	)
Missouri Department of Corrections, *Appellee.*	)

Appeal from the United States District Court for the Eastern District of Missouri

Before WOLLMAN, Chief Judge, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges.

OPINION

WOLLMAN, Chief Judge.

Margaret A. Walker appeals from the district court's[1] grant of summary judgment in favor of the Missouri Department of Corrections (Department) on her claims under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, and the Missouri Human Rights Act (MHRA), Mo. Rev. Stats. §§ 213.010 - .137. We affirm.

I.

This case comes before us for the second time, see Walker v. Missouri Dep't of Corrections, 138 F.3d 740 (8th Cir. 1998), and thus we limit our exposition of the facts. Walker began to work for the Department in 1987, verifying information from and interviewing inmates in order to provide information to those who determined the bond for those arrested by the State. Walker suffers from polio and post-polio syndrome, which in the early 1990s began to limit her work activities and has since rendered her completely unable to work. In November of 1994, Walker filed suit in federal court on employment discrimination grounds, contending that the Department should have granted her several reasonable accommodations that would have provided her with the opportunity to continue her employment for a longer time.

In 1996, the district court granted summary judgment to the Department because Walker had not demonstrated that she had been subject to an adverse employment action by the

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[1] The Honorable Lawrence O. Davis, United States Magistrate Judge for the Eastern District of Missouri, who presided over the case with the consent of the parties pursuant to 28 U.S.C. § 636(c).

Department because of her disability. See id. at 741-42. Because the Department had based its motion for summary judgment on the ground that Walker was not a qualified individual with a disability, we found that Walker had not had notice that the adverse employment action element was at issue and had been denied the opportunity to respond. See id. at 742. Thus, we found that the court's ruling was procedurally improper and remanded the case to the district court for further proceedings. See id.

In April of 1999, following further proceedings that included Walker's response, the district court again granted summary judgment in favor of the Department, finding again that Walker had failed to make a prima facie case because she did not establish that she had been subject to an adverse employment action. Walker appeals.

II.

Intervening decisions prevent us from reaching the merits of Walker's claims. The district court's grant of summary judgment in favor of the Department was entered on April 7, 1999. Subsequently, we decided two cases that defeat Walker's ADA claim. In Alsbrook v. City of Maumelle, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc), cert. granted in part, 120 S. Ct. 1003 (2000), and cert. dismissed, 120 S. Ct. 1265 (2000), we held that Congress lacked the power to abrogate a state's eleventh amendment immunity from suit in federal court under Title II of the ADA. Then, on August 9, 1999, we decided DeBose v. Nebraska, 186 F.3d 1087, 1088 (8th Cir. 1999) petition for cert. filed, 68 U.S.L.W. 3391 (U.S. Dec. 1, 1999) (No. 99-940), in which we extended Alsbrook's principles to Title I of

the ADA. Thus, because Walker's claims are based on Title I and are against a state agency that Walker does not contend has consented to suit or waived immunity, Walker's ADA claims must fail.[2] Similarly, we conclude that the district court properly dismissed Walker's claims under the MHRA. See Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Nixon, No. 99-2635, 2000 U.S. App. LEXIS 7345, at *12-13 (8th Cir. April 24, 2000) (state agency entitled to eleventh amendment immunity in federal court and should have been dismissed from the case).

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[2] The Supreme Court recently granted certiorari in an Eleventh Circuit case that reached a contrary conclusion. See Garrett v. University of Ala. at Birmingham Bd. of Trustees, 193 F.3d 1214, 1218 (11th Cir. 1999), cert. granted, 120 S. Ct. 1669 (2000); see also 68 U.S.L.W. 3649 (Apr. 17, 2000) (explaining that "Question presented [is]: Does the 11th Amendment bar suits by private citizens in federal court under Americans with Disabilities Act against nonconsenting states?").

APPENDIX B

UNITED STATES COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Filed April 7, 1999]

No. 4:94CV02278 LOD

MARGARET A. WALKER,
Plaintiff,

v.

MISSOURI DEPARTMENT OF CORRECTIONS,
Defendant.

ORDER AND MEMORANDUM OF UNITED STATES MAGISTRATE JUDGE

This case is before the undersigned United States Magistrate Judge by consent of the parties pursuant to 28 U.S.C. § 636(c). Presently before the Court is defendant's motion for summary judgment.

Plaintiff brings this lawsuit pursuant to the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, et seq., and the Missouri Human Rights Act (MHRA), § 213.010 RSMo., 1986, against her former employer,

defendant Department of Corrections (DOC).[1] Plaintiff alleges that she suffers from post-polio syndrome and that as her condition deteriorated she requested defendant to make certain "reasonable accommodations" to enable her to continue to perform her essential job functions. Plaintiff further alleges that defendant refused to honor her requests.

The Court will only give a brief recitation of the facts, as they are largely undisputed. Plaintiff was employed by defendant as a bond investigator beginning on October 13, 1987. During her tenure plaintiff made several complaints concerning her parking problems at work. In April 1993, plaintiff was diagnosed as suffering from post-polio syndrome. On numerous occasions plaintiff requested the following accommodations:

1. having a handicapped parking place designated for her so as to minimize the distance she must travel between her car and work;

2. having the exterior areas surrounding her place of employment made "handicapped friendly"; and

3. having her office area made "handicapped friendly" so that she may perform the essential functions of her job.

---

[1] By prior order of this Court, another defendant, the City of St. Louis, was dismissed from this suit.

Although defendant took various steps to alleviate plaintiff's parking problem, it did not institute her requested accommodations. Plaintiff stopped working for defendant in May 1994 because of her medical condition. It is undisputed that plaintiff is now totally disabled and unable to work.

DISCUSSION

In determining whether summary judgment should issue, the facts and inferences are viewed in the light most favorable to the non-moving party and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R.Civ.P. 56(c); Matsushita Electrical Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 586-87 (1986). Once the moving party has met this burden, the non-moving party may not rest on the allegations in his pleadings but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. Fed. R.Civ. P. 56(e).

Defendant seeks summary judgment on the grounds that plaintiff cannot establish that she suffered an adverse employment action as required to establish her claims under the ADA and the MHRA. Defendant argues that plaintiff was not terminated and that she left of her own accord. Defendant also points out that she suffered no decrease in pay, demotion, loss of benefits, or reduction in her responsibilities. Defendant also argues that it offered a legitimate reason for its failure to procure the parking spot plaintiff wanted.

In response, plaintiff argues that she is a qualified person with a disability, that she requested accommodations

that were reasonable and possible, and that defendant has failed to show that it would have been an undue hardship for it to accommodate her.

The Court finds that plaintiff has failed to establish a prima facie case of discrimination under the ADA. The Court initially notes that it previously granted defendant summary judgment, finding that plaintiff had failed to show that she suffered any adverse employment action. Plaintiff successfully appealed that decision arguing that that issue had not been raised by defendant and that she did not have a chance to respond. Walker v. Mo. Dept. of Corr., 138 F.3d 740, 742 (8th Cir. 1998). The issue has now undisputedly been raised by defendant and plaintiff has had a chance to respond.

The ADA provides that:

> "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

42 U.S.C. § 12112(a).

To establish a prima facie case of discrimination under the ADA, plaintiff must show: (1) she has a "disability" as defined by the ADA; (2) she was qualified, with or without accommodation, to perform the essential functions of the job;

and (3) she suffered an adverse employment action. Kiel v. Select Artificials, Inc., 1999 WL 107986 (8th Cir. 1999); Hennenfent v. Mid Dakota Clinic, P.C., 164 F.3d 419, 421-22 (8th Cir. 1998); Walker, supra.

It is undisputed that plaintiff was disabled and that she was qualified to do the job prior to her becoming totally disabled. Plaintiff, however, fails to allege in her complaint that she suffered an adverse employment action. There is no allegation by plaintiff that defendant discriminated against plaintiff in regard to any advancement, discharge, compensation, job training, or other terms, conditions, and privileges of employment as required under § 12111. Thus, plaintiff has failed to allege, much less establish, her prima facie case.

Plaintiff does allege in her complaint that because of defendant's failure to make requested accommodations she had to take medical leave without pay, which "effectively" terminated her employment. Plaintiff, however, does not argue that she was terminated by defendant or that she was constructively discharged. Thus, since plaintiff left her job of her own accord, she cannot claim that she suffered an adverse employment action under the ADA. Hammon v. DHL Airways, Inc., 165 F.3d 441, 447 (6th Cir. 1999).

Plaintiff does claim that defendant failed to accommodate her by honoring her request for better parking, to alter the building's entrance to make it more accessible, to make it easier for her to intereiew inmates, to allow her to use a scooter, and for a more comfortable chair. The Court notes that an employer is not obligated to provide the accommodation an employee requests, the employer need only

provide some reasonable accommodation. Hennenfent, 164 F.3d at 422 n.2, quoting Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996).

Moreover, the denial of these requests does not constitute an adverse employment action. See Montandon v. Farmland Industries, Inc., 116 F.3d 355, 359 (8th Cir. 1997) (plaintiff's low evaluation score and requirement by employer that he transfer to a new city, which did not entail a change in plaintiff's position, title, salary, or any other aspect of his employment, did not constitute an adverse employment action); accord Williams v. Britsol-Meyers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996); see also Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (adverse action is defined under Title VII to include only those actions that cause a "materially significant disadvantage."); Flannery v. Trans World Airlines, Inc., 160 F.3d 425, 428 (8th Cir. 1998) (change in plaintiff's work hours, moving her parking space further away, reprimand and admonishment for minor violations, and reassignment with no reduction in benefits did not constitute adverse employment action); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (minor changes in working conditions with no reduction in pay or benefits does not constitute an adverse employment action, "otherwise every trivial personnel action that an irritable . . . employee did not like would form the basis of a discrimination suit").

Plaintiff also argues in her memo in opposition that she is a qualified person with a disability, that she requested accommodations that were reasonable and possible, and that defendant has failed to show that it would have been an undue hardship for it to accommodate plaintiff. Apparently, plaintiff

erroneously believes that defendant's alleged discrimination, in this case the alleged failure to make her requested reasonable accommodations, in and of itself establishes a violation of the ADA.

However, the issue of reasonable accommodations goes to the second prong of the prima facie case. Under the plain terms of the statute there is also a requirement that any discrimination against an individual because of their disability be "in regard to" a component of employment such as "advancement," "discharge," or "compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Thus, assuming plaintiff can, with or without reasonable accommodations, perform the essential functions of her job, plaintiff has failed to make any allegation or showing that she was discriminated against "in regard to" any "terms, conditions, and privileges of employment" or the like, i.e., that she suffered an adverse employment action. Compare Lyons v. Legal Aid Society, 68 F.3d 1512, 1517 (2nd Cir. 1995) (dismissal by court for failing to state a claim under the ADA reversed as plaintiff alleged she suffered financially and that she was unable to perform the duties of her job due to defendant's failure to provide reserved parking). In the absence of an adverse employment action,

plaintiff fails to establish a prima facie case under the ADA. Keil, supra.[2]

Plaintiff also argues that defendant missed the clear signal provided by the Eighth Circuit in its opinion in Walker, supra, which reversed the original grant of summary judgment in this case, and its citation to Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995). However, both Walker and Benson note the requirement of an adverse employment action in an ADA case. Furthermore, in Benson it was undisputed that the plaintiff had suffered an adverse employment action.

Similarly, in order to establish a prima facie case of discrimination under the MHRA, plaintiff was required to show that her defendant employer took adverse action against her. Cook v. Atoma International of America, Inc., 930 S.W.2d 43 (Mo. App. 1996); Rose City Oil Co. v. Missouri Commission on Human Rights, 832 S.W.2d 314, 316 (Mo. App. 1992). As detailed previously, plaintiff has failed to make such a showing. Thus, defendant is also entitled to summary judgment on plaintiff's MHRA claim.

IT IS HEREBY ORDERED that defendant's motion for summary judgment (Dkt. #42) is **granted**.

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[2] Buried deep in plaintiff's memo is a claim that as a result of defendant's failure to accommodate her, plaintiff was often late for work, which was the reason she did not receive a transfer she was promised. There is no such claim in plaintiff's complaint. Furthermore, plaintiff testified at her deposition that she was not told she would definitely get the transfer and promotion.

An appropriate judgment accompanies this order.

/s/_____
LAWRENCE O. DAVIS
United States Magistrate Judge

Dated this 7th day of April, 1999.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Filed April 7, 1999]

No. 4:94CV02278 LOD

MARGARET A. WALKER,
Plaintiff,

v.

MISSOURI DEPARTMENT OF CORRECTIONS,
Defendant.

JUDGMENT

In accordance with the order filed this date and incorporated herein,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is **GRANTED**.

IT IS FINALLY ORDERED, ADJUDGED and **DECREED** that judgment is hereby entered in favor of defendant and against plaintiff in this cause of action.

/s/_____
Lawrence O. Davis
United States Magistrate Judge

Dated this 7th day of April, 1999.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed July 10, 2000]

No. 99-2321EMSL

Margaret A. Walker,	)
Appellant,	)
	)
v.	)
	)
Missouri Department of	)
Corrections,	)
Appellee.	)
	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc has been considered by the court and is denied. The petition for rehearing by the panel is also denied. (5193-010199)

July 10, 2000

Order Entered at the Direction of the Court:

/s/_____
Clerk, U.S. Court of Appeals, Eighth Circuit